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IN THE UNITED STATES SUPREME COURT
OCTOBER TERM 1997

KEVIN OLIVER PETITIONER

V. NO._____

STATE OF ARKANSAS RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
FROM THE ARKANSAS COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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Attorneys for Petitioner
Kevin Oliver

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Kevin Oliver

QUESTIONS PRESENTED FOR REVIEW

1. Whether raising a general objection to the lack of proof beyond a reasonable doubt was sufficient, as a matter of law, to preserve that issue for purposes of the Fifth, Sixth and Fourteenth Amendments when the State Appellate court notes that the only purpose of more specificity is to give the State an opportunity "as justice requires" to reopen its case and put in more evidence.

2. Whether the need to "pinpoint the missing elements" in light of the foregoing essentially relieves the State of part of its burden in producing proof beyond a reasonable doubt.

3. Whether when the evidence pointed

equally at two (2) equally plausible possibilities, one of which inculpated and one of which exculpated Petitioner, the jury at Petitioner's as finder of fact could constitutionally find for his guilt beyond a reasonable doubt.

c. Whether each material element of crime of battery in the second degree under Arkansas law was proven when no evidence was adduced that proved physical injury to the victim or that the victim was incompetent.

PARTIES TO THIS PROCEEDING

All parties are listed in the case caption. This is a criminal matter involving only the State of Arkansas and Petitioner, Kevin Oliver. No corporate or business entity is involved in this matter as a party.

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C. CONSTITUTIONAL PROVISIONS:

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CITATION OF OFFICIAL REPORT OF OPINION

Kevin Oliver v. State of Arkansas, CA CR97-133, Slip Op Arkansas Court of Appeals (November 12, 1997) Opinion not designated for publication.

STATEMENT OF JURISDICTION OF THIS COURT

A. Date Judgment Entered: Entered on November 18, 1997, by the Arkansas Court of Appeals, a court of last appellate resort within and for the State of Arkansas.

B. Orders on Rehearing or Extension: None

C. Reliance on Rule 12.5: None

D. Statutory Basis for Writ of Certiorari: 28 USC Section 1257

E. Special Notifications Under Rule 29: Not applicable. The State of Arkansas is being provided with a copy of this Petition.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINACNES AND REGULATIONS INVOLVED IN THIS CASE:

AMENDMENT V, UNITED STATES CONSTITUTION

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT VI, UNITED STATES CONSTITUTION

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature

and caused of the accusation, to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT XIV, SECTION 1, UNITED STATES CONSTITUTION

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof; are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Arkansas Code Annotated 5-13-202.
Battery in the second degree.

(a) A person commits battery in the second degree if:

(1) With the purpose of causing physical injury to another person, he causes serious physical injury to any person;

F) An individual who is incompetent as defined by § 5-25-101 (3).

(b) Battery in the second degree is a Class D felony.

Arkansas Code Annotated 5-25-101. Definitions.

(3) "Incompetent" means any person unable to care for himself because of physical or mental disease or defect. The status embraced by this definition may or may not exist regardless of any adjudication concerning incompetency;

Arkansas Rule of Criminal Procedure 33.1

A motion for directed verdict based on insufficiency of the evidence must specify the respect in which the evidence is deficient; a motion merely stating that the evidence is insufficient for conviction does not preserve for appeal issues relating to a specific deficiency such as insufficient proof on the elements of the offense. . .

STATEMENT OF THE CASE

This case arises from the conviction of Petitioner in the Circuit Court of Clark County, Arkansas, and the subsequent appeal to the Arkansas Court of Appeals, which, along with the Arkansas Supreme Court, sits as a court of last appellate review within its areas of jurisdiction. Petitioner has thus exhausted State court review.

At a jury trial, Petitioner was found guilty of of second degree battery in violation of Arkansas Code Annotated 5-13-202. He was sentenced by the jury to six (6) years in the Arkansas Department of Corrections and fined $10,000.00.

At trial the evidence developed

Petitioner was a twenty (20) year employee of the Human Development Center in Arkadelphia, Arkansas, a center for the mentally retarded/developmentally disabled. Over the course of the years Petitioner had risen to the position of supervisor in that institution.

He was working in this capacity on the morning of April 21, 1996. According to the sole witness against Petitioner, Willette Lay, at approximately 9:00 A.M. an altercation erupted between a group leader in one of the cottages at the facility, Ms. Melinda Allen and a resident, one Merlin Kilbury. Kilbury was said to be "severely retarded" by Rebecca Riggle, an on-call nurse for the

facility. Riggle's testimony was the only evidence entered of Kilbury's mental status and she was at no time qualified as an expert in this field. Record at 171.

The altercation became physical with Kilbury overturning and throwing chairs and with Allen--who was separately prosecuted and convicted--administering an undisputedly brutal beating, resulting in numerous injuries, bruises, and cuts, some of which required stapling. In short, Allen beat Kilbury with a sock filled with soap bars until he was a bloodied mess. Kilbury identified his attacker as "Linda" which Nurse Riggle took to mean "Melinda". Id at 173.

Lay claimed that while the

altercation was in progress, she twice telephoned Oliver, who did not come immediately. When Oliver arrived on the scene, he found a smashed glass plant stand and that Kilbury was bleeding from a head wound which Oliver was led to believe was self-inflicted.

Kilbury was quite agitated. Oliver allegedly told Lay, "I'm going to talk to my child" and led him outside. Once outside, Lay claims that she saw Oliver batter Kilbury utilizing his knee three or four times to the chest and of hearing Kilbury make a sound like "Ugh,Ugh" three or four times--a kind of gagging sound as she described it. Record at 140-141.

Afterwards Oliver took Kilbury to

his office for about 30 minutes before taking him for medical examination. The only injuries noted on exam were a two centimeter gash in Kilbury's scalp, a bruised lip, and some "red lines" on his chest; x-rays of the chest were normal.

Lay claimed that after Oliver left with Kilbury, Allen and another worker, Mattie Anderson, attempted to orchestrate a cover-up. However, three days after the incident, Lay informed Human Development Center investigative personnel that Allen had beaten Kilbury. Allen was terminated and ultimately entered a guilty plea in exchange for forty-eight months' probation.

It is undisputed that Lay did not

report the alleged battering by Oliver, however, until June 4, 1996, approximately six (6) weeks after the alleged incident.

At trial a great deal of evidence of the damage done in the beating was put on. However, the record is devoid of any indication of injury to the chest or abdomen consistent with the "kneeing" allegedly done by Kilbury.

At the end of the State's evidence, counsel for Defendant moved for a directed verdict stating, "The State has not put on enough evidence for a reasonable jury to find proof beyond a reasonable doubt that Kevin Oliver has committed any battery second." Record at 175.

The Arkansas Court of Appeals did

not reach the merits of the case as it held as a matter of law that the stated objection did not sufficiently preserve the record because, among other reasons, it did not allow the State the opportunity to reopen and address any proof that had been omitted.

Based upon this finding, and the motions raised, Petitioner herein seeks review on Writ of Certiorari to resolve questions relating to the Fifth, Sixth and Fourteenth Amendments as applied in this case.

ARGUMENT

This case presents for review a question of what, constitutionally, is required to preserve an objection to the sufficiency of the evidence where it is alleged that the State has failed to prove its case beyond a reasonable doubt. That is, can a Defendant constitutionally be required to pinpoint the specific elements of the crime that the State failed to provide in its case, especially in light of State authority that the trial court may then reopen the State's case to allow inclusion of the missing proof? The subsidiary issue is, of course, the impermissible lightening of the State's burden by

such procedure.

In its decision of November 13, 1997, as entered November 18, 1997, the Arkansas Court of Appeals held in this case:

> A motion for directed verdict must state the specific ground of the motion. . .In Lovelady v. State, 326 Ark 196, 931 SW2d 430 (1996), the supreme court stated:
>
> We have made it clear that proof of the element of the crime that is alleged to be missing must be specifically identified in a motion for directed verdict. The reasona underlying our holdings is that when specfic grounds are stated and the absent proof is pinpointed, the trial court can either gran the motion, or *if justice requires, allow the State to reopen its case and supply the missing proof.*
> Ark Court of App. Slip Op. Pages3-4 (Emphasis supplied)

The holding in these cases was based on Arkansas Rule of Criminal Procedure, 33.1, also promulgated

by the Arkansas Supreme Court, which states in the pertinent part:

Arkansas Rule of Criminal Procedure 33.1

> A motion for directed verdict based on insufficiency of the evidence must specify the respect in which the evidence is deficient; a motion merely stating that the evidence is insufficient for conviction does not preserve for appeal issues relating to a specific deficiency such as insufficient proof on the elements of the offense. . .

Ark. Rules Crim. Pro., Rule 33.1

Petitioner disagrees vehemently with the motion for directed verdict was insufficient to put the State on notice of the objection and particularly would note the formulation of Ark. Rule Crim. Pro. 33.1, to the extent that it was designed to allow the State to reopen its case after it had rested to

include the missing element it forgets is a violation of fundamental fairness and due process under the Sixth and Fourteenth Amendments. If this is its purpose, or even a part of its purpose, the Rule is unconstitutional as written and as applied.

The *sine qua non* for a criminal conviction is that each material element of the case against a defendant be proven beyond a reasonable doubt. In re: Winship, 397 US 358 (1970). To do less violates the Fifth and Sixth Amendments of the United States Constitution, as well as the Due Process guarantees of the Fourteenth Amendment. Id. Jackson v. Virginia, 443 US 307 (1979)

The trier of fact in this matter,

had a duty no less than that of a juror to listen to all the evidence fully and fairly, and to decide doubt beyond a reasonable doubt. Jackson supra. The Court of Appeals has refused to consider the merits in a case where it is plain that proof beyond a reasonable doubt did not exist and that there were at least two (2) reasonable explanations of events, one inculpatory, the other exculpatory, which could have been adduced by the circumstantial evidence of the case. Under such circumstances, Arkansas law requires a finding of "not guilty" See Hadley v. State, 322 Ark 472, 910 SW2d 675 (1995). Yet the Court of Appeals failed to act based upon a supposed

technical flaw of not uttering the right "magic words" to preserve the objection.

The evidence at trial, if taken in the light most favorable to the State, still reveals that Willette Lay, first of all, did not report events until well after the fact--although she did implicate another employee in the beating of Kilbury. That Kilbury was beaten and injured was undisputed.

However, just who caused Kilbury injury? Most of the testimony that came in related to damage Melinda Allen had done to the victim. When questioned by Nurse Riggle, Kilbury could state that "Linda" did the beating. He did not mention Kevin Oliver.

In order to find Oliver guilty of second degree battery, the State had to prove, beyond a reasonable doubt that the alleged episode of "kneeing" the victim also caused injury. The evidence here is lacking. Chest x-rays were normal. Some red marks were noted on Kilbury's chest, but whether they came from a knee or a flailing sock is not certain. Kilbury did not cry out in pain but simply said, "ugh" several times. Even if the facts are believed, they more appropriately point to third degree battery, which is a misdemeanor rather than a felony.

The only other question was one of competency. The nurse, who admittedly is on call at the facility, stated that Kilbury was "profoundly

retarded". There is no evidence that she was competent to give this opinion. Obviously Kilbury was competent enough to name his attacker--Linda as he called her. There is no mention of "Kevin" or "Oliver" by him.

Petitioner's Fifth, Sixth and Fourteenth Amendment right to fundamental fairness and a fair trial was thus compromised to his prejudice. These rights are then further compromised by the elevation of form over them through the application of Rule 33.1.

It is axiomatic that a conviction must be upon proof of the State's case "beyond a reasonable doubt". In re: Winship supra. The "critical inquiry" is one of whether the evidence of

record would support a finding of guilt beyond a reasonable doubt. Jackson supra at p. 318. Here we have a court of last resort making a technical denial of review where there should be finding that the trial court had before it two equally plausible explanations, to wit, Petitioner did as he was accused or, Willette Lay, was wrong or lying, and Melinda Anderson was the cause of all the victim's injuries. There was no evidence to support the needed element of physical injury by this particular Defendant beyond a reasonable doubt. The pertinent statute states:

> (a) A person commits battery in the second degree if:
>
> (1) With the purpose of causing

physical injury to another person, he causes serious physical injury to any person;

F) An individual who is incompetent as defined by § 5-25-101 (3).

Thus, to meet the burden of In re: Winship supra and of Jackson supra, there had to be proof that the actions of Petitioner were, first, the cause of physical injury and second, that the victim was incompetent. The objection entered by counsel in the form of a motion for directed verdict, which was appropriately renewed after all evidence, was neither vague nor lacking in potential to notify the State of what was intended. Counsel should not be required to lay out every element lacking when the burden is on the State, especially when one

of the stated reasons for the requirement of doing so is that the State may have another bite at the apple.

CONCLUSION

For each of these reasons, the Petition for Certiorary should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served upon the person(s) listed below by placing a copy of the same in the United States Mail, postage prepaid, or by such other service as may be indicated hereinbelow.

Winston Bryant, Attorney General, State of Arkansas, 200 Catlett-Prien Tower Bldg, 323 Center St., Little Rock, AR. 72201

Dated this _____ day of _____, 19_____.

Winston Bryant, Arkansas Attorney General, 343 Center St. Suite 200, Little Rock, AR. 72201

Circuit Clerk of Clark County, Clark County Courthouse, Arkadelphia, Arkansas.

_____

APPENDIX

Arkansas Court of Appeals,

(STAMPED NOVEMBER 18, 1997)

NOT DESIGNATED FOR PUBLICATION

DIVISION IV

ARKANSAS COURT OF APPEALS

NO CACR97-133

Opinion Delivered

November 12, 1997

KEVIN OLIVER,
APPELLANT

An Appeal From The Clark County Circuit Court

V.

Hon. W.H. "Dub" Arnold, Judge.

AFFIRMED

STATE OF ARKANSAS,
APPELLEE

ANDREE LAYTON ROAF, Judge

A jury in Clark County convicted the appellant, Kevin Oliver, of

second-degree battery for allegedly kneeing in the chest an eighteen-year-old resident of the Arkansas Human Development Center. Oliver was sentenced to six years in the Arkansas Department of Correction and received a $10,000 fine. On appeal Oliver argues that the trial court erred in denying his motion for a directed verdict and in refusing to admit into evidence the conviction record of a fellow employee of the Arkansas Human Development Center who beat the victim minutes before Oliver's alleged act. We affirm.

Beginning as a volunteer while he was still in high school, Oliver worked for approximately twenty years at the Human Development Center. He

progressed to the position of supervisor and was working in that capacity on the morning of April 21, 1996. The victim, Merlin Kilbury, was a ten year resident of the Human Development Center. Kilbury was classified as "severely retarded" by Rebecca Riggle, director of nursing at the center.

According to Willette Lay, the only eyewitness to testify at trial, at approximately 9:00 a.m. an altercation erupted between Kilbury and his group leader, Melinda Allen. In the course of a running melee that lasted for approximately thirty minutes, Allen severely beat Kilbury with a sock containing bars of soap.

Lay claims that while the alter-

cation was in progress, she called Oliver twice. When Oliver finally arrived on the scene, he found that Kilbury had smashed a glass plant stand and was bleeding from a head wound that his residence cottage staff led Oliver to believe was self-inflicted. Kilbury was still quite agitated at the time. Oliver told Lay that, "I'm going to talk to my child" and led Kilbury outside the cottage. Once outside, Lay claims that she saw Oliver Knee Kilbury three or four times in the chest causing him to make a noise that Lay described as "like a cough, or like a gag . . .like a 'Ugh,ugh'" and that Oliver took Kilbury to his office for approximately thirty minutes before

taking him to receive medical attention. The only injuries noted were a two-centimeter gash in Kilbury's scalp, a bruised lip and some "red lines" on his chest; x-rays were normal.

Lay claimed that after Oliver left with Kilbury, Allen and Mattie Anderson, another staff member who was also present in the cottage during the beating, attempted to orchestrate a cover-up. Nonetheless, three days after the incident, Lay informed Human Development Center personnel that Allen had beaten Kilbury. Allen was terminated on May 6, 1996. Shortly after Lay made her allegations, a criminal investigation by the Clark County Sheriff's Department began.

Ultimately Allen entered a guilty plea in exchange for forty-eight months' probation. Lay, however, did not report that Oliver had kneed Kilbury until June 4, 1996, approximately six weeks after the alleged incident. Lay claimed that she did not report Oliver because she was "nervous, scared by him being the supervisor." Lay, however, left the Human Development Center approximately one week after the alleged incident.

Oliver first argues that the trial court erred in denying his directed-verdict motion because there was insufficient evidence for a jury to find either that he caused physical injury to the victim or that the victim was an incapacitated person.

However, we cannot reach the merits of this argument.

A motion for a directed verdict must state the specific grounds of the motion. The Arkansas Rule of Criminal Procedure 33.1 provides in the pertinent part:

> A motion for directed verdict based on insufficiency of the evidence must specify the respect in which the evidence is deficient; a motion merely stating that the evidence is insufficient for conviction does not preserve for appeal issues relating to a specific deficiency such as insufficient proof on the elements of the offense. . .

See Walker v. State, 318 Ark 107, 883 SW2d 831 (1994). In Lovelady v. State, 326 Ark 196, 931 SW2d 430 (1996), the supreme court stated:

> We have made it clear that the proof of the element of the crime that is alleged to be missing must be specifically identified in a motion for a

> directed verdict. The reason underlying our holdings is that when the specific grounds are stted and the absent proof is pinpointed, the trial court can either grant the motion or, if justice requires, allow the State to reopen its case and supply the missing proof. (Citations omitted.)

Further, in Walker v. State, 318 Ark 107, 883 SW2d 831 (1994), relied upon by the court in Lovelady, the supreme court stated, "[w]e draw a bright line and hold that a motion for a directed verdict in a criminal case must state the specific ground of the motion." Id at 109, 883 SW2d at 832.

For the purpose of preserving a sufficience of the evidence arguemtn for appeal, Oliver's directed verdict motion was clearly deficient. He merely stated:

> The State has not put on enough evidence for a reasonable jury to find proof beyond a reasonable doubt that Kevin Oliver has commited any battery second. They have one witness whose testimony has clearly been impeached. She certainly had an interest in keeping a cover--she admitted, not reveal any names, specifically not my client's name.

Oliver's motion did nothing to inform the trial court of the allegedly missing proof. Moreover, the substance of the purported deficiency in the State's proof was ascribed soley to Willette Lay's credibility, which the trial judge correctly noted was a matter for the jury.

Additionally, we note that on appeal Oliver challenges specific elements. A defendant cannot change the grounds for a directed-verdict motion on appeal, but is bound by the

scope and nature of the arguments presented at trial. Wallace v. State, 53 Ark App. 199, 920 SW2d 864 (1996).

For his second point, Oliver argues, without citation of authority, that even though the certified copy of Allen's conviction record was excluded as cumulative, it should have been admitted because it would have helped cure the prejudice that resulted from the practical impossibility of separating Melinda Allen's actions from his. Oliver had tried to have the record admitted at the close of his case-in-chief. We also cannot reach the merits of this argument.

The argument that Oliver asserts on appeal is different from the argument he made to the trial court.

It is an appellant's burden to apprise the trial court of the specific reasons why the conviction record was admissible, and he cannot assert new reasons on appeal. Baker v. State, 310 Ark 485, 837 SW2d 471 (1992). Moreover, Oliver does not argue that the report was not cumulative. It is not reversible error to exclude evidence which is merely cumulative. Edwards v. State, 40 Ark App 114, 842 SW2d 459 (1992)

Affirmed.

Arey and Crabtree, J.J. agree.